APPENDIX.

Cases Relied on by Circuit Court to Defeat Petitioner's Claim to a Bad-Debt Deduction.

Tulsa Tribune Co. v. Commissioner, 58 Fed. (2d) 937.

In this case three men agreed to organize a corporation and furnish it the necessary capital to buy a Tulsa newspaper. One of the promoters negotiated the purchase with funds in part advanced by the three and in part borrowed for the purpose. The corporation was then organized, took the property, and issued its stock for the money advanced by the promoters and assumed their debt for the money borrowed. The Court held (citing numerous cases) that, in so acting, the three promoters were in law and in fact the agents of the new company so that, upon its organization, their acts became the acts of the new company, and that the corporation had, therefore, paid cash for the property and issued its stock to the subscribers for the money advanced by them for its account.

This was not a holding that, if three individuals owned property and contributed it to a corporation for its stock, the transaction might be held in "substance" to have been that they paid cash for the stock and the company paid them cash for the property because the net result in substance would have been similar.

To make the situation in the case at bar analogous to that involved in the *Tulsa Tribune Co.* case, it would have been necessary for the Courts below to have found that Samuel Mather Estate, Inc. took the assets and liabilities from the Mather executors as their agent; that its stockholders took the same in 1938 and made their payments in 1939 as agents of the executors; and that then the executors and Probate Court distributed the net assets to the legatees under Mather's will,—although under the stipulated actualities all of the transfers were "duly" made; the statutory corporate liquidation was "duly carried out"; the execu-

tors were discharged; the legatees had accepted shares of the Estate Company in full satisfaction of their claims against the Estate and some of them had disposed of all or part of their stock in the Estate Company; and everything in the record indicated that the Estate Company had been organized to hold the assets in perpetuity and only liquidated because of the difficulties which later developed and for the relief of which Congress included in the 1938 Revenue Act the special liquidation provisions of Section 112(b)(7).

Commissioner v. Ashland Oil & Refining Co., 99 Fed. (2) 588;
Prairie Oil & Gas Co. v. Motter, 66 Fed. (2d) 309.

In each of these cases a company desired to acquire *certain* assets of another corporation. The transferor corporation was therefore stripped of its other assets and the stock of the transferor was assigned to the transferee upon payment in cash of the price agreed to be paid for the property. The transferor was thereupon immediately liquidated and its assets transferred to the acquiring company. It was held in each case that the transaction was not a tax-free reorganization and that the tax base of the acquired assets in the hands of the purchasing company was the price it paid for the stock. While the opinions contain some interesting discussion of the rule of real "substance," they are in no way authority for disregarding real, actual, functioning, corporate entities, or for substituting the "substance of what might have been done" for the "substance *of the thing done.*"

To make those decisions applicable to the Mather situation, it would have been necessary for the Tax and Circuit Courts to have found that Mather's estate was administered in the customary manner (when in fact it is conceded by both Courts that such is not the case), and that Samuel Mather Estate, Inc. was only a sham and a fiction

and it and its stockholders were only an agency of the executors and the Probate Court and that such executors and court were in fact directing and conducting the Company's business and the actions and payments of its stockholders for years after the estate was closed.

Ahles Realty Corporation v. Commissioner, 71 Fed. (2d) 150.

In this case a corporation, all of whose stock was owned by one Snyder as trustee, transferred all of its assets to petitioner in exchange for all of petitioner's stock and income debenture bonds. The transferor corporation was subsequently liquidated and the securities of the petitioner ultimately passed to Snyder. Upon the subsequent sale by the petitioner of the property so acquired, the Commissioner took the position that the basis for determining gain or loss realized upon the sale was the cost of the property to the transferor corporation, while petitioner contended that such basis was the fair market value of the property at the date of acquisition. The Court held that the transaction was in substance a reorganization of the transferor corporation and not in truth or in fact a sale of the property involved.

Here again neither the holding, nor the language of the opinion, enlarges the rule of "substance of *the thing done*" to include, as *done*, things found not to have been *done*.

Helvering v. Clifford, 309 U. S. 331.

Here a husband had declared himself trustee for five years of certain of his own securities to pay the income to his wife during such period. The Supreme Court held that he "continued to be the owner" of the securities, that he "retained the substance of full enjoyment of all the rights which previously he had in the property" and that it was not reversible error for the trial court to find that

"the husband was the owner of the corpus." Being the owner, he, and not the trust, was accordingly taxed on the income.

This was *not* a holding that, although the husband was not the owner, he was to be taxed on the income as if he had been the owner.

To make the instant case fit such holding, it would have been necessary for the Tax and Circuit Courts to have found that the executors continued to own the Mather assets throughout the life of the Estate Company and while they were in the hands of, and the income from them was being taxed to, the stockholders; that the stipulated statutory corporate liquidation did not occur; and that the executors and not petitioner, in substance and in fact, made the 1939 payments on the accommodation note from funds of the closed estate.

The Tax and Circuit Courts did not so find. They found in substance and in fact just the opposite. But both Courts held that petitioner should nevertheless be taxed as if they had so found.